**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

**UNITED STATES OF AMERICA**

**v.** **Case No. 8:03-CR-77-T-30TBM**

**HATEM NAJI FARIZ**
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**MR. FARIZ'S REPLY MEMORANDUM TO THE GOVERNMENT'S FISA CONSTITUTIONALITY MEMORANDUM AND UNCLASSIFIED FISA MEMORANDUM**

**REDACTED VERSION**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, respectfully submits this reply memorandum to the Government's (1) Memorandum Regarding the Constitutionality of the Foreign Intelligence Surveillance Act ("FISA") (Doc. 844) and (2) Unclassified Memorandum Regarding the Disclosure of FISA Applications, Orders and Related Materials and the Authorization and Conduct of the FISA Electronic Surveillances (Doc. 845). In support of Mr. Fariz's Second Amended Motion for Disclosure of FISA Materials and for Suppression of the Fruits of All Surveillance Conducted under FISA (Doc. 798), and in reply to the government's responses, Mr. Fariz states:

## I. Introduction

Mr. Fariz raised a number of issues in his motion. In response to the government's arguments, Mr. Fariz herein principally addresses why he should be entitled to participate in the process of determining whether the electronic surveillance conducted in this case conforms to the requirements of the U.S. Constitution and FISA. In particular, Mr. Fariz (1)

addresses the appropriate standard for the Court's determination of whether to disclose the materials, (2) challenges whether the government has complied with the minimization procedures as required by 50 U.S.C. § 1801(h), (3) reasserts his contention that the purpose of the electronic surveillance is significant for determining whether the government complied with the Fourth Amendment and FISA, and (4) challenges whether the FISA applications could show probable cause that he was an agent of a foreign power or contained misrepresentations of fact. In sum, Mr. Fariz respectfully asserts that he made a sufficient showing, at the very least, to warrant oral argument and an evidentiary hearing. Mr. Fariz also reasserts his grounds for suppression.

While Mr. Fariz has only addressed some of the issues in this reply memorandum, he does not waive any of the components of his initial motion or concede any of the issues/arguments/statements made by the government in its response. Instead, if not further addressed in this reply memorandum, Mr. Fariz relies on his initial motion.

## II. Mr. Fariz's Motion for Disclosure and Suppression Includes Any and All FISA Applications and Orders in which Mr. Fariz is a Target or is Overheard on Any Other Individual's Wiretap

At the outset, Mr. Fariz reasserts that the scope of Mr. Fariz's motion for disclosure and suppression expressly included "any and all FISA applications, orders, and intercepts where Mr. Fariz is either the target or is overheard on others' surveillance." (Doc. 798 at 1-2; *id.* at 2 ("Mr. Fariz herein seeks to suppress the fruits of *any and all* electronic surveillance conducted pursuant to FISA . . . .") (emphasis added)). Thus, despite the government's statement to the contrary (Doc. 845 at 4 n.3), Mr. Fariz has sought the disclosure of any and

all FISA applications and the suppression of any FISA surveillance where Mr. Fariz is either the target or is overheard on others' wiretaps. Mr. Fariz did not limit his request to only those applications where Mr. Fariz, Sami Al-Arian, or Sameeh Hammoudeh were targets. (Doc. 798 at 2 ("Mr. Fariz has been recorded on others' wiretaps, including *but not limited to* Dr. Al-Arian and Mr. Hammoudeh . . . .") (emphasis added)). Accordingly, Mr. Fariz again includes as the subject of his motion any and all FISA applications and orders where he is the target or is heard on any other individual's wiretap.

## III. Mr. Fariz Reasserts His Request for Disclosure of the FISA Applications, Orders, and Related Materials

Mr. Fariz requested the disclosure of (1) the FISA applications and orders, (2) the authorizations of the Attorney General, referenced in 50 U.S.C. § 1806(b), permitting the use of FISA-derived information in this case, and (3) the dates of any and all grand jury activity in this matter. In response to Mr. Fariz's and the other defendants' motions, the government provided to the Court, *ex parte*, the Government's Classified Memorandum Regarding the Disclosure of FISA Applications, Orders, and Related Materials and the Authorization and Conduct of the FISA Electronic Surveillances. The government also provided to the Court, *ex parte*, (1) the unclassified Declaration and Claim of Privilege of the Attorney General of the United States, (2) two classified Declarations of Willie T. Hulon, the Assistant Director of the Counterterrorism Division of the Federal Bureau of Investigation ("FBI"), (3) the classified Declaration of Julian A. Koerner, addressing the FBI's compliance with the

minimization procedures, and (4) certified copies of the classified FISA applications, orders, and related materials.

Mr. Fariz seeks the disclosure of each of these materials under the standard set forth in FISA, 50 U.S.C. § 1806(f), and pursuant to the U.S. Constitution. Mr. Fariz relies on his initial motion in support of disclosure, and addresses the following issues in response to the government's memorandum.

**A. FISA Standard for Disclosure**

In response to a motion for suppression, "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States," the court shall "review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f). FISA provides that the Court may, however, "disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance" or where "due process requires discovery or disclosure." *Id.* § 1806(f), (g). Thus, under this standard, the complexity of the allegations in the affidavits may warrant defense participation (*cf.* Doc. 845 at 9), since the complexity itself relates to the Court's ability to determine the "legality of the surveillance." (*See* Doc. 798 at 12-13 and cases cited therein).

The legislative history further explains that disclosure may be warranted in cases where:

> [T]he question [of the legality of the surveillance] may be more complex because of, for example, indications of possible misrepresentation of fact, vague identification of the persons to be surveilled or surveillance records which includes a significant amount of nonforeign intelligence information, calling into question compliance with the minimization standards contained in the order.

S. Rep. No. 95-604, Part I, at 58 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3960. While the government dismisses this reference to the legislative history in *United States v. Duggan*, 743 F.2d 59, 78 (2d Cir. 1984) as *dictum* (Doc. 845 at 10), legislative history is not mere dictum. On the contrary, Mr. Fariz submits that FISA's standard for disclosure warrants the production of the FISA applications, orders, and related materials in this case.

### B. Declaration of the Attorney General: The Government's Assertion of the National Security Privilege

While the government indicated that it would serve the unclassified documents on defense counsel (Doc. 845 at 5), the government apparently did not file and serve the unclassified Declaration and Claim of Privilege of the Attorney General of the United States; instead, it only provided the Attorney General's Declaration to the Court. Mr. Fariz would request that he be provided a copy of the Attorney General's unclassified declaration, particularly since it forms the basis for the government's assertion of a national security privilege and the government provides no reason for its nondisclosure.

### C. The Government's Failure to Minimize, At the Very Least, Warrants the Disclosure of the FISA Applications, Orders, and Related Materials

Mr. Fariz reasserts his arguments that the government's failure to minimize nonpertinent communications calls into question the government's compliance with the minimization orders and warrants the suppression of the fruits of this electronic surveillance. (Doc. 798 at 14, 21-25). Mr. Fariz contends, as described more fully herein, that sufficient questions are raised as to the government's minimization efforts to warrant, at the very least, oral argument and an evidentiary hearing.[1]

#### 1. The Government Recorded, Retained, and Disseminated Every Single Telephone Call in its Execution of the Electronic Surveillance at Issue in this Case

In this case, a "significant amount of nonforeign intelligence information [in the surveillance records], call[s] into question [the] compliance with the minimization standards contained in the order[s]." S. Rep. No. 95-604, Part I, at 58, *reprinted in* 1978 U.S.C.C.A.N. at 3960. Mr. Fariz questioned in his initial motion the government's compliance with the minimization procedures, as outlined in 50 U.S.C. § 1801(h), in light of (1) the government's recording of every conversation during the execution of the electronic surveillance, resulting

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[1] In addition to its unclassified memorandum, the government has provided to the Court, for *ex parte*, *in camera* review, a classified declaration regarding the FBI's purported compliance with the minimization procedures. (Doc. 845 at 5, 48). The government does not explain why such a memorandum is classified or should be provided to the Court *ex parte*. Mr. Fariz objects to the government's *ex parte* submission of a declaration that attempts to advocate that the FBI complied in good faith with the minimization procedures. The government contends that it recorded all of the conversations during the applicable FISA periods and has provided all of these calls to the defense. The government should, therefore, be able to litigate openly whether it complied with the minimization procedures.

in 21,000 hours of recorded conversation ("acquisition"); (2) the government's subsequent retention of all 21,000 hours of conversations ("retention"); and particularly (3) the dissemination of every conversation, despite its irrelevance to any alleged criminal activity, to law enforcement ("dissemination"), in violation of 50 U.S.C. § 1801(h)(2) and (3). (Doc. 798 at 21-25). Mr. Fariz therefore requested the disclosure of the FISA materials and suppression of the fruits of this electronic surveillance.

The government acknowledges that it recorded every phone call, and that law enforcement and criminal prosecutors received a copy of every phone call. The government further acknowledges, as it has done repeatedly, that only a very small fraction of the calls have any relation to this case. The government claims, however, that it complied in good-faith with the minimization requirements by recording, retaining, and disseminating to law enforcement every single telephone conversation during the past decade since it only indexed or summarized approximately twenty percent of the communications. (Doc. 845 at 47-48). Specifically, the government contends that by not preparing a summary of the conversation, the conversation is not "retained in a workable and easily retrievable form" and it is therefore minimized. (*Id.* at 47; *id.* at 49).[2] Even among those calls that were summarized, and therefore in the government's view were *not* minimized, the government has conceded that

[2] The government additionally argues that Mr. Fariz "concedes [that] communications that are deemed not to be foreign intelligence information, if recorded, 'would not be indexed, and thus become [effectively] non-retrievable.'" (Doc. 845 at 47). Mr. Fariz made no such concession. Instead, Mr. Fariz noted the procedures that the Foreign Intelligence Surveillance Court outlined in an opinion, and used those procedures to argue that the wholesale *dissemination* of all calls to law enforcement violated 50 U.S.C. § 1801(h)(2) and (3). (Doc. 798 at 22-25).

"only a small fraction of those are germane to the criminal case." (Letter of Terry A. Zitek, dated Jan. 12, 2004, at 2) (attached as Exhibit 1).

In this respect, every single phone call was disseminated to law enforcement, despite FISA's express requirement that "nonpublicly available information, which is not foreign intelligence information . . . shall not be disseminated in a manner that identifies any United States person, without such person's consent." 50 U.S.C. § 1801(h)(2); *id.* § 1801(h)(1) (providing that the procedures should be designed to "prohibit the dissemination[] of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information"). FISA provides that "evidence of a crime" may be disseminated for law enforcement purposes, *id.* § 1801(h)(3), not every call between husband and wife, between coworkers, or between individuals concerning topics having no relation to this case.

More specifically, when any conversation is handed over from the foreign intelligence officials to law enforcement officers or criminal prosecutors, it is disseminated. Nothing prevents the recipients of this information to listening to these conversations, and in many cases, readily identifying the speakers. It would not be possible to describe for the Court in specific detail every phone call that should not have been retained and disseminated to law enforcement and that demonstrates a violation of the minimization procedures required by 50 U.S.C. § 1801(h)(2) and (3). Instead, Mr. Fariz herein attempts to provide a number of examples of telephone calls that illustrate these violations:

[REDACTED Pursuant to Court Order (Doc. 859).]

These calls are merely illustrative.[3] Many more calls that were wholly private and had no relation to any foreign intelligence or law enforcement purposes were recorded, retained, and disseminated to law enforcement despite the requirements of 50 U.S.C. § 1801(h); *see also* S. Rep. No. 95-604, Part I, at 44, *reprinted in* 1978 U.S.C.C.A.N. at 3946 ("Similarly, conversations unrelated to foreign intelligence should not be retained or, of course, disseminated."). The government cannot accurately contend – given its concession that the vast majority of calls (whether summarized or not) are irrelevant to its case – that these calls were retained and disseminated because of coded language or the foreign-intelligence nature of the case. (Doc. 845 at 45, 49). Instead, the government recorded, retained, and disseminated *every* single conversation, despite the identities of the speakers, the content of the conversation, and its irrelevance to any foreign intelligence investigation or criminal prosecution.

The government has therefore failed to comply with adequate minimization procedures. The government's contention that minimization occurs by the government's decision not to summarize the call is inadequate. Even in the absence of a summary, all of the calls are available, and the speakers of the call are often identifiable (as described above). Calls that have no relation to foreign intelligence or to evidence of a crime should not have

[3] To complete this process, members of Mr. Fariz's defense team took some of the CDs containing Mr. Fariz's intercepted calls and provided a summary of some of the calls.

been retained and disseminated.[4] *See* S. Rep. No. 95-604, Part I, at 32, *reprinted in* 1978 U.S.C.C.A.N. at 3933 ("In addition, information about a United States citizen's private affairs shall not be deemed 'foreign intelligence information' unless it directly relates to his activities on behalf of a foreign power. This interest is achieved by including in each subsection of the foreign intelligence definition the requirement that the information sought actually 'relates to' the type of information deemed necessary or essential. For example, the government could not seek purely personal information about a United States citizen or permanent resident alien, who is a suspected spy, upon a theory that it might learn something which would be 'compromising.'").[5]

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[4] Indeed, the legislative history shows that Congress meant for minimization to protect individual's privacy rights. For example, the Senate Judiciary Committee wrote, "By minimizing retention, the Committee intends that information acquired, which does not relate to approved purposes justifying the warrant, be destroyed. For example, after determining that A's wife is not engaged with her husband in clandestine intelligence activities, her communications, acquired and retained in order to make this determination, would be destroyed. Indeed, even A's communications which are not relevant to his clandestine intelligence activities should be destroyed." S. Rep. No. 95-604, Part I, at 38, *reprinted in* 1978 U.S.C.C.A.N. at 3939; *accord* S. Rep. No. 95-701, at 40 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 4009.

[5] If the government is seriously contending that it minimized calls by not logging or summarizing the calls, and thereby made them non-retrievable (Doc. 845 at 47), then the logical conclusion to this argument is that the government has necessarily made any *Brady* calls non-retrievable. The government cannot simultaneously claim that it satisfied its *Brady* obligations by producing every single phone call (Doc. 844 at 33-36), but then "minimized" these calls as well (Doc. 845 at 47). If anything, the government's practice requires the defense (if not also the prosecution team) to listen to all of the irrelevant, private telephone calls to find the information that is exculpatory. Moreover, the government did not provide the tech cuts to the defense until March 2004, over a year after the indictment, and only after Mr. Fariz moved for transcripts for all of the intercepts.

In further response to Mr. Fariz's arguments, the government contends that a small number of mistakes would not support the conclusion that the government failed to make a good-faith effort to minimize, and that the appropriate solution would be to suppress the communications that should have been minimized. (Doc. 845 at 50). The government's failure to minimize cannot be characterized as a "small set of mistakes,"(*id.*), especially where the government acknowledges, in its own estimation, that "about 98% of the FISA communications were useless to everyone." (Exh. 1, Letter of Terry Zitek, at 1). The government, therefore, cannot take shelter from such cases as *United States v. Bennett*, 219 F.3d 1117, 1124 (9th Cir. 2000) (Doc. 845 at 50), since in that case only a mere 3.65% calls were improperly intercepted. Moreover, the government's proposed remedy – suppression of the calls that should have been minimized – is inappropriate in this case given that *all* calls were recorded, retained, and disseminated. FISA, and the Fourth Amendment, protect the privacy interests and civil liberties of individuals; to propose that the government be precluded from introducing at trial irrelevant information – information it would likely not seek to use anyway – is hardly a remedy that vindicates the serious constitutional privacy interests at stake. Instead, the exclusionary rule was designed to serve as a check on government's abuses of authority.

At the very least, Mr. Fariz respectfully submits that serious questions exist as to whether the government complied with minimization procedures as outlined in 50 U.S.C. § 1801(h). Mr. Fariz therefore reasserts his request for oral argument and an evidentiary

hearing, particularly with respect to whether the government complied with the minimization procedures.

### D. Foreign Intelligence or Law Enforcement Purpose of the Electronic Surveillance

Mr. Fariz maintains his argument that the purpose of the surveillance – foreign intelligence gathering or criminal prosecution – is significant to this Court's determination of whether the surveillance complied with the Fourth Amendment and FISA. (Doc. 798 at 17-21, 25-37 and cases cited therein).[6]

Mr. Fariz had additionally requested, in relation to the purpose of the surveillance, the dates of any and all grand jury activity in this matter and the authorization(s) of the Attorney General, pursuant to 50 U.S.C. § 1806(b), permitting the use of the FISA intercepts in this case. The government has actually provided the former information in response to Dr. Al-Arian's motion to dismiss for pre-indictment delay, stating that "[a]fter the items seized from the 1995 searches were analyzed, a grand jury investigation was convened in 1998 and continued until the first indictment was returned." (Doc. 775 at 16). Thus, the government was simultaneously pursuing a criminal prosecution and foreign intelligence investigation

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[6] Both parties cite to the Foreign Intelligence Surveillance Court of Review ("FISCR")'s opinion in *In re Sealed Case*, 310 F.3d 717 (FISCR 2002). The target of the surveillance in *In re Sealed Case* was not a party to the FISA Court's or FISCR's consideration of these issues. Instead, the National Association of Criminal Defense Lawyers and the American Civil Liberties Union ("ACLU") participated as *amici* in the Court of Review. 310 F.3d at 719. The ACLU moved for leave to intervene to file a petition for writ of certiorari in the United States Supreme Court, but its petition was denied. *ACLU v. United States*, 538 U.S. 920 (2003). Accordingly, the Supreme Court has yet to consider this issue.

at least since 1998 (if not 1995). Mr. Fariz questions whether this information was disclosed in the FISA applications submitted since 1995.

The government has indicated that the Attorney General's authorizations are classified. (Doc. 845 at 29 n.26). Mr. Fariz questions why the Attorney General's authorizations are classified and are therefore not available for the defense to review, since such authorizations have been made available in other cases. *See In re Kevork*, 634 F. Supp. 1002, 1007 (C.D. Cal. 1985). Mr. Fariz therefore reasserts his request for disclosure of these authorizations.

**E. Agent of a Foreign Power and Misrepresentations of Fact**

Mr. Fariz challenged in his initial motion whether the government could establish probable cause that he was an agent of a foreign power, as defined in 50 U.S.C. § 1801(b)(2). Particularly with reference to knowingly engaging in international terrorism, 50 U.S.C. § 1801(b)(2)(C), Mr. Fariz noted that this definition requires that the government show that he engaged in violent acts, or the preparation of violent acts. (Doc. 798 at 15). Mr. Fariz reasserts this challenge and, should the Court only review the FISA applications and orders *ex parte* and *in camera*, Mr. Fariz respectfully reasserts his request to submit an *ex parte*, *in camera* memorandum to address this issue.

Mr. Fariz also challenged whether there were misrepresentations of fact, warranting disclosure of the FISA materials and suppression of the fruits of the surveillance. In particular, Mr. Fariz noted the possibility that the government could have relied on its

misidentification of Abd Al Aziz Awda. (Doc. 798 at 16-17).[7] With respect to other possible misrepresentations, the government contends that "[s]ince the defendants have all of the communications intercepted during the FISC-authorized surveillance of Al-Arian, Hammoudeh, Fariz and Shallah, they are in an excellent position to direct the Court's attention to specific facts with respect to those FISA surveillances." (Doc. 845 at 11). The issue before the Court, however, concerns whether misrepresentations of fact or misleading information were included in the FISA applications. *See* S. Rep. No. 95-604, Part I, at 58, *reprinted in* 1978 U.S.C.C.A.N. at 3960. Mr. Fariz cannot adequately address this issue in the absence of actually reviewing the applications. There are certainly a number of disputes that Mr. Fariz has concerning the contents of the FISA intercepts, including their translation, interpretation, and relation to the case, but these disputes may be irrelevant if they do not relate to any alleged facts contained within the government's FISA applications. Mr. Fariz therefore renews his request, pursuant to FISA and the Due Process Clause, for the disclosure of the FISA applications. (Doc. 798). Should the Court only review the FISA applications and orders *ex parte* and *in camera*, Mr. Fariz respectfully reasserts his request to submit an *ex parte*, *in camera* memorandum to address potential inaccuracies within the FISA applications.

[7] Mr. Fariz incorporates by reference his reply memorandum addressing the misidentification of Awda in the search warrant affidavit. (Doc. 857).

## IV. Conclusion

For the reasons asserted in Mr. Fariz's Second Amended Motion for Disclosure of FISA Materials and for Suppression of the Fruits of All Surveillance Conducted under FISA (Doc. 798), and as further addressed herein, Mr. Fariz requests that this Court (1) order the disclosure of the FISA orders, applications, and materials and (2) suppress the fruits of all FISA surveillance in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26th day of January 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Assistant Federal Public Defender